Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1994

ZEKARIA REALTY, INC.,

*Petitioner,*

v.

COUNTY OF OCEAN, a Public Corporation of the State of New Jersey,

*Respondent.*

**Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division**

## PETITION FOR WRIT OF CERTIORARI

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77 pp

## QUESTION PRESENTED

Whether a state court practice rule prescribing a forty-five day time period for challenging a planning board's actions violates the takings clause of the United States Constitution, where a property owner's claim to just compensation for an inverse condemnation is made within the applicable statute of limitations?

## LIST OF PARTIES

The list of parties appears in the caption of the case.

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The Opinion of the Superior Court of New Jersey, Appellate Division, decided March 4, 1994, affirming the Law Division Order dated September 1, 1993, is reproduced at Appendix, p. A1. The Order of the Supreme Court of New Jersey, denying the Appellant's Motion for Leave to Appeal, dated June 22, 1994, is reproduced at Appendix, p. A15. The Order of the Superior Court of New Jersey, Law Division, Ocean County, granting Stay Pending Disposition of the Appeal, issued September 24, 1993, is reproduced at Appendix, p. A18. The Order of the Superior Court of New Jersey, Law Division, Ocean County, issued September 1, 1993, is reproduced at Appendix, p. A16.

## JURISDICTION

The date of the Order of the New Jersey Supreme Court denying the motion for leave to appeal was June 22, 1994. The Opinion of the Superior Court of New Jersey, Appellate Division, was entered on March 4, 1994. The Order of New Jersey Superior Court, Law Division, Ocean County, was issued September 1, 1993. This Court has jurisdiction to review the judgment or decree in question by writ of certiorari under 28 U.S.C. § 1257 (1993).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are:

1. The Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution, Section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The New Jersey Court Rules, *R.* 4:69, entitled "Actions in Lieu of Prerogative Writs," is set forth in Appendix, p. A49.

## STATEMENT OF CASE

This case involves th ght of Zekaria Realty, Inc. (hereinafter referred to as the "Petitioner") to receive just compensation in a condemnation action for the taking of a fifteen foot right-of-way easement. The Petitioner's property is located on Brick Boulevard, Brick Township; Brick Township is located in Ocean County, New Jersey.

On March 31, 1992, the County of Ocean of the State of New Jersey (hereinafter referred to as the "Respondent") filed a complaint in condemnation to acquire a fee simple interest in approximately 3420 square feet of property owned by the Petitioner. The area condemned comprised approximately a twenty foot-wide by 175 foot-long strip of frontage of the Petitioner's property. Fifteen feet of the twenty foot-wide strip were already subject to a permanent right-of-way easement (hereinafter referred to as the "Easement"), which was exacted from the Petitioner by the Ocean County Planning Board in 1979. At issue is whether the Respondent must pay the Petitioner just compensation for the Easement as part of the current condemnation action, given that the required dedication of the Easement would violate the United States Constitution and was held by the New Jersey Supreme Court, Appellate Division, to violate the New Jersey Constitution.

In 1978, the Petitioner's property contained a furniture store, beauty parlor, shoe store and barber shop. The Petitioner desired to renovate the structure whereby the latter three uses would be eliminated; the renovated space would thereafter be utilized for a dress shop or

boutique. The Petitioner was required to make application to both the Ocean County and Brick Township Municipal Planning Boards (hereinafter referred to as the County Planning Board and Municipal Planning Board, respectively), although no exterior alterations were being considered. On November 1, 1978, the County Planning Board granted approval to the Petitioner's site plan application, provided that the Petitioner adhere to the customary practice of dedicating to the Respondent a permanent easement comprising a strip of land approximately fifteen feet on the Petitioner's 175-foot frontage for "possible future street widening". Appendix, p. A2. On February 14, 1979, the Brick Township Municipal Planning Board granted final approval to Petitioner's site plan application, subject to the same terms and conditions in the County Planning Board's final approval. Appendix, p. A2. Confronted with the "choice" of granting the Easement to the Respondent or receiving a denial to its application, the Petitioner acquiesced to the County Planning Board's demand and conveyed the required Easement to the Respondent on January 22, 1979. Appendix, p. A36.

Prior to the dedication of the Easement to the Respondent, the Petitioner used the Easement for parking. Moreover, from the time of the 1979 site plan approval until the current 1992 condemnation proceeding, the Petitioner continued to use and enjoy the Easement as twenty parking spaces. Although the 1979 site plan approval did not contain a provision for such parking, the Respondent did not interfere with the Petitioner's use and enjoyment of the Easement for parking subsequent to the dedication, therefore, the Petitioner

continued its use of the Easement in the same manner as prior to the 1979 required dedication.

On May 27, 1992, the Respondent filed a declaration of taking for exclusive possession and title to the approximately 3420 square feet of the Petitioner's property. The Respondent's appraisal report recognized that parking would be reduced from twenty to eleven parking spaces as a result of the current 1992 taking. Appendix, p. A44. The Respondent's appraisal report, however, provided for no compensatory damages to the Petitioner as a result of that portion of the 3420 square feet of the Petitioner's property relating to the Easement previously dedicated to the Respondent in 1979. Appendix, p. A43.

On August 20, 1993, the Petitioner brought a motion in the New Jersey Superior Court, Law Division, seeking exclusion of the Respondent's appraisal, inclusion of its appraisal, and a declaration of its right to damages for the Easement granted in 1979. The Petitioner argued that the County Planning Board's 1979 requirement of a "donative" conveyance violated the New Jersey and Federal Constitutions, and was ultra vires, therefore, the "donative" conveyance should not be given any legal effect. The Petitioner also argued that since the Respondent made no effort to enforce the Easement, thereby permitting the Petitioner to use and enjoy the property in the same manner as before the required 1979 dedication, the Petitioner retained its constitutional right to just compensation for the Easement. The Respondent cross-moved to restrict the Petitioner's appraisal report and for an adjudication that the Respondent was the "legal" owner of the Easement.

By Order dated September 1, 1993, the Law Division granted Respondent's cross-motion "to the extent that the Court concludes that a Deed of Easement, attached hereto as Exhibit "A", *is owned by the County of Ocean, lawfully,* and the County of Ocean does not have to pay an compensation for the interest in real property reflected in Exhibit "A" attached hereto." Appendix, p. A17 (emphasis added). The Petitioner sought leave to appeal to the Superior Court of New Jersey, Appellate Division, which was granted on October 18, 1993. Appendix, p. A14. The Petitioner, therefore, filed with the Law Division a Motion for Stay from any further proceedings pending the disposition of the Petitioner's appeal, which was granted. Appendix, p. A18.

On appeal, the Appellate Division held that the Respondent violated the takings clause of the New Jersey Constitution when it required the Petitioner to dedicate the 1979 easement as a condition of approval to its variance and site plan application, given that the County Planning Board required the dedication of the Easement "regardless of any rational nexus between the [Petitioner's] plan and the burden to the abutting roadway." Appendix, p. A7. In fact, the Appellate Division stated that the Respondent "certainly cannot claim that this dedication was for a presently contemplated, immediate improvements because of burdens to the road created by the [Petitioner]." Appendix, p. A7. Nevertheless, the Appellate Division held that the Petitioner was precluded from receiving just compensation for the Easement because the Petitioner failed to file within forty-five days an action in lieu of prerogative writs pursuant to *R.* 4:69(b)(3) of the New Jersey Court Rules challenging the

County Planning Board's exactment of the Easement. Appendix, p. A10. Finally, the Appellate Division held that because there was neither a "novel or substantial constitutional question which commands resolution," nor an "important public interest [that] requires clarification or vindication", the forty-five day time limitation set forth in *R.* 4:69-6(b)(3) for challenging the County Planning Board's unconstitutional action would not be enlarged as permitted pursuant to *R.* 4:69-6(c). Appendix, p. A11.

The Petitioner filed with the Supreme Court of New Jersey a Motion for Leave to File An Interlocutory Appeal From Order of the Superior Court of New Jersey, Appellate Division. The Petitioner's motion was denied on June 22, 1994. Appendix, p. A15.

## REASON FOR ALLOWANCE OF THE WRIT

**THE APPELLATE DIVISION'S HOLDING THAT THE PETITIONER'S CLAIM TO JUST COMPENSATION FOR THE EASEMENT IS TIME-BARRED BECAUSE THE PETITIONER DID NOT FILE AN ACTION CHALLENGING THE PLANNING BOARD'S UNCONSTITUTIONAL ACTIONS WITHIN FORTY-FIVE DAYS VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

The Appellate Division's holding that the Petitioner's claim for just compensation is time-barred because the Petitioner did not file an action in lieu of prerogative writs within forty-five days of the required dedication violates the Fifth and Fourteenth Amendments of the United States Constitution. The Petitioner's claim to just

compensation for the unconstitutional "dedication" of the Easement in 1979 was made well within the twenty year statute of limitations for actions affecting real estate, N.J. Stat. Ann. § 2A:14-7 (West 1987). Appendix, p. A45. The requirement to file an action in lieu of prerogative writs challenging a planning board's actions is not required by State statute, but, rather, is a practice rule of the New Jersey Courts. Appendix, p. A49. Nevertheless, the Appellate Court held that that Appellant's claim was time-barred because the Appellant did not bring an action in lieu of prerogative writs within forty-five days of the County Planning Board's required dedication. Appendix, p. A10. Applying a forty-five day period for the Petitioner to challenge the Planning Board's unconstitutional action, violates the takings clause of the United States Constitution.

Taken to its illogical end, the Appellate Division's rationale permits an abridgement of an individual's constitutional rights so long as a court imposed practice rule setting forth a forty-five day time period has expired without objection, despite a claim being raised within the applicable statute of limitations set forth by the New Jersey State legislature. The Appellate Division's narrowing of the twenty year statute of limitations to forty-five days in the case of an inverse condemnation grants judicial countenance to an unconstitutional taking. Moreover, the Appellate Court abused its discretion when it failed to enlarge the forty-five day period for challenging the County Planning Board's action as permitted pursuant to the New Jersey Court Rules, *R.* 4:69-6(c). Appendix, p. A53. Finally, given that the Respondent did not take any action to disrupt the Petitioner's continued use and

enjoyment of the Easement as twenty parking spaces after the "donative" conveyance, the Petitioner's right to challenge the Respondent's unconstitutional taking of the Easement did not accrue until the filing of the present condemnation action. Simply stated, the issues are: (i) whether the Petitioner is entitled to just compensation for the illegal taking of the Easement where the Petitioner brought its claim within the applicable statute of limitations, but beyond the forty-five day period prescribed by the New Jersey Court Rules; (ii) whether the Appellate Court abused its discretion by failing to enlarge the forty-five day period permitted by the New Jersey Court Rules, given that the Appellate's claim for just compensation was made within the statute of limitations and the gravity of constitutional questions presented; and (iii) whether the Petitioner's cause of action accrued at the time of the current taking given that Respondent failed to enforce the illegally obtained Easement, thereby permitting the Petitioner to continue its use and enjoyment of the Easement as twenty parking spaces as the Petitioner did prior to the required 1979 dedication. The Petitioner alleged before the Law Division, Appellate Court and Supreme Court of New Jersey that the required conveyance by the County Planning Board violated the takings clause of the New Jersey and United States Constitutions.

### A. The Petitioner's Claim for Just Compensation Was Made Within the Applicable Statute of Limitations, Therefore, the Petitioner's Claim Is Not Time-Barred.

The taking clause of the Fifth Amendment to the United States Constitution, made applicable to the States

through the Fourteenth Amendment, requires that private property shall not be taken without just compensation to the property owner. *Chicago, B. & O.R. Co. v. Chicago,* 166 U.S. 226, 239 (1897). "One of the principal purposes of the Takings Clause is to 'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Dolan v. City of Tigard,* 114 S. Ct. 2309, 2316 (1994) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). The Appellate Division's holding that a property owner is divested from his constitutional right to just compensation where he fails to challenge an illegal taking within a forty-five day period pursuant to a practice rule of the State court, but within the applicable statute of limitations set by the State legislature, represents judicial approval of an unconstitutional inverse condemnation and violates the United States Constitution.[1]

Although decided prior to the decision in *Dolan,* the Appellate Division held that the Respondent's taking of the Easement violated the takings clause of the New Jersey Constitution, namely, N.J. Const. art. I, § 20. Appendix, p. A48. Based upon the Appellate Court's finding of fact, the dedication required by the County Planning Board would similarly fail the "reasonable relationship" test set forth in *Dolan.*

The Appellate Division noted that the dedication of the Easement "for possible future street widening" was

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[1] The Supreme Court of New Jersey, Appellate Division's, opinion does not address the fact that the Appellant's claim to just compensation for the inverse condemnation was made within the twenty year statue of limitations.

simply an attempt by the County Planning Board "to seize an opportunity to 'bank' the land in case it should ever need it." Appendix, p. A7. The Appellate Division recognized that ten years elapsed between the time of the required dedication of the Easement and when the Respondent decided to widen the roadway abutting the Petitioner's property, requiring the conclusion by the Appellate Court that "the [Respondent] cannot claim that this dedication was for presently contemplated, immediate improvements because of burdens on the road created by the [Appellant]." In fact, the Appellate Division determined that "the County regularly required such dedications regardless of any rational nexus between an applicant's plan and the burden to the abutting roadway." Appendix, p. A7. Therefore, the Appellate Division concluded that had the Petitioner "brought a timely action in lieu of prerogative writs in 1979 to challenge the conditional dedication, it likely would have succeeded." Appendix, p. A7. Given the Appellate's Court's factual determination, the dedication exacted from the petitioner would likewise violate the takings clause of the United States Constitution.

Despite its finding of an unconstitutional taking under the New Jersey Constitution, the Appellate Division held that the Petitioner's claim for just compensation was time-barred by virtue of the time limits prescribed by the New Jersey Court Rules for challenging planning board decisions. Appendix, p. A10. *R.* 4:69-6(b)(3) of the New Jersey Court Rules, entitled "Limitation on Bringing Certain Actions; Particular Actions" provides:

> No action in lieu of prerogative writs shall be commenced to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality, provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or mailing of the notice to the applicant, whichever is later.

The Appellate Division's rationale is suspect, however. The Petitioner's claim to just compensation for the inverse condemnation of the Easement was made well within the twenty year statute of limitations for challenging an inverse condemnation. The New Jersey eminent domain statute does not provide a time within which a property owner must pursue his remedy, therefore, the statute of limitations prescribed for actions involving real property is applicable, namely, twenty years. *See Krambeck v. City of Gretna*, 154 N.W.2d 691, 693-94 (Neb. 1977); *W.A. Sundell v. Town of New London*, 409 A.2d 1315, 1321 (N.H. 1979). Despite the Petitioner raising its claim to just compensation for the Easement within the applicable statute of limitations, the Appellate Court held the Petitioner's claim was "time-barred" based upon the practice rule of the New Jersey Courts setting forth a forty-five day time requirement for challenging the County Planning Board's actions. Appendix, p. A10. The Appellate Court failed to recognize that the New Jersey Court Rules

are merely "rules governing the practice and procedure in the administration of all the Courts in the State", and are not meant to supplant the legislatively enacted statute of limitations. Appendix, p. A16. Moreover, the New Jersey Courts are not to make substantive law through the exercise of the rule-making power. *Busik v. Levine*, 307 A.2d 571, 578 (N.J. Sup. Ct. 1970). Consequently, the Appellate Division's abridgement of the Petitioner's constitutional right to just compensation, by applying a forty-five day window to file its claim, violates the takings clause of the United States Constitution. The Petitioner's claim was made within the applicable statute of limitations and, therefore, was timely made and should be permitted.

### B. The Appellate Court Abused its Discretion by Failing to Expand the Forty-Five Day Period for Challenging the Planning Board's Action.

Although the New Jersey Court rules provide for a forty-five day requirement to challenge actions of a planning board, the Appellate Court abused its discretion by failing to enlarge the forty-five day period as permitted under the New Jersey Court Rules. Specifically, the Appellate Court recognized that pursuant to *R.* 4:69-6(c), it could enlarge the forty-five day time limitation set forth for challenging actions of a planning board. Appendix, p. A10. *R.* 4:69-6(c) of the New Jersey Court Rules permits the Court to "enlarge the period of time [within which to file an action in lieu of prerogative writs] where it is manifest that the interest of justice so requires." Appendix, p. A53. The New Jersey Supreme Court has stated that where, for example, (i) "important and novel constitutional questions" are presented or (ii) "important

public rather than private interests which require adjudication or clarification" exist, the forty-five day time period should be relaxed. *E.g., Reilly v. Brice,* 538 A.2d 362, 362 (N.J. Sup. Ct. 1988). Additionally, the New Jersey Courts have recognized that a claim for a taking of private property supports the relaxation of *R.* 4:69-6(b)(3). *Kent v. Borough of Mendham,* 267 A.2d 73, 77 (N.J. Super. Ct. App. Div. 1970). The Appellate Court erroneously held, however, that there is "no novel or substantial constitutional question which commands resolution; nor does any important public interest require clarification or vindication." Appendix, p. A11. Contrary to the Appellate Division's conclusion, it is manifest that the present case presents both an "important and novel constitutional question" and "an important public rather than private interest which requires adjudication or clarification, thereby requiring a relaxation of the forty-five day time period.

### C. The Petitioner's Claim to Just Compensation Accrued At the Time of the Current Taking.

The Petitioner's use and enjoyment of the Easement as twenty parking spaces was never disrupted by the Respondent at any time between the exaction of the Easement by the County Planning Board and the current taking, despite the fact that the Easement did not provide for such parking use by the Petitioner. Therefore, the Petitioner continued to enjoy the Easement after the required conveyance in the same manner as before the required conveyance. Nevertheless, the Appellate Division grounded its decision on the Petitioner's "lack of

due diligence". Appendix, p. A11. To the contrary, the Petitioner's use and enjoyment of the Easement was never abridged; rather the Respondent failed to act diligently when it permitted the Petitioner to continue to use the Easement as parking in the same manner after the Easement was conveyed as before the conveyance. It was not until the current 1992 taking that the Petitioner's use and enjoyment of the Easement was disrupted; that is, when the Petitioner's use of the Easement as twenty parking spaces was reduced to eleven. Moreover, if the Respondent had attempted to prevent the Petitioner from using the Easement for parking at any time after the required dedication, the Petitioner certainly would have been able to defend its continued use of the Easement based upon the ultra vires and illegal actions of the County Planning Board. As a result, the Petitioner's cause of action for just compensation did not accrue at the time of the required dedication to the Respondent; but, rather, the Petitioner's cause of action accrued at the time its use and enjoyment of the Easement were abridged, namely, at the time the Petitioner's use of the Easement was curtailed from twenty parking spaces to eleven.

## CONCLUSION

The Appellate Division erred in holding that the Petitioner was time-barred from receiving just compensation for the unconstitutional taking of the Easement. Restricting the Petitioner's claim for just compensation for the Easement to merely a forty-five day period,

although made within the applicable statute of limitations, violates the takings clause of the United States Constitution. For these reasons, and because significant constitutional issues are presented, this petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES A. MAGGS,
*Attorney for the Petitioner*

DATED: September 19, 1994

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-825-93T2

COUNTY OF OCEAN, a Public Corporation of the State of New Jersey,

Plaintiff-Respondent,

v.

ZEKARIA REALTY, INC., ET AL.

Defendant-Appellant.

(Filed March 4, 1994)

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Argued telephonically: January 7, 1994 – Decided: MAR 4, 1994

Before Judges King, A. M. Stein and A. A. Rodriguez.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County.

Peter H. Wegener argued the cause for appellant (Bathgate, Wegener, Dugan & Wolf, attorneys; Mr. Wegener and Michael I. Helfacre, on the brief).

Seymour J. Kagan argued the cause for respondent (Berry, Kagan & Sahradnik, attorneys; Mr. Kagan, on the brief).

The opinion of the court was delivered by

KING, P.J.A.D.

This case involves the right of a property owner to recover damages in condemnation for the taking of a fifteen-foot right-of-way easement. Fourteen years before the taking, the property owner conveyed an easement over the property to the County as a condition of variance and site plan approval. Because of this passage of time without any protest by the property owner, we conclude that the claim for damages in condemnation is time-barred.

Defendant, Zekaria Realty, Inc., is the owner of improved commercial property on Lots 11, 11-1 and 11-2, at Block 673, in Brick Township. In 1978, defendant's property contained a furniture store, beauty parlor, shoe store and barber shop. During 1978, defendant decided to renovate the structure and eliminate the latter three uses. Defendant planned to use the renovated space for a dress shop or boutique. Defendant requested dimensional variances and site plan approval from the municipality and the County Planning Board (County).

On November 1, 1978 the County granted defendant approval of its site plan application and dimensional variances on several conditions. Most importantly, the County required defendant to grant or "donate" to it a permanent easement for a strip of about fifteen feet on its 175-foot frontage on Brick Boulevard for "possible future street widening." On February 14, 1979 the Brick Township Municipal Planning Board granted final approval to defendant's application subject to the same conditions included in the County's final approval.

Defendant's 1979 site plan approval contained no approval for parking in front of its building on the strip

subject to the permanent easement. Nevertheless, without municipal or County approval, defendant subsequently used spaces for roadside parking on the available 125-foot frontage which was not part of the driveway entrance.

More than a decade passed without incident until March 20, 1990. On that day the Ocean County Board of Freeholders decided to widen Brick Boulevard. It ordered the County engineer to acquire rights-of-way or easements by gift, purchase or condemnation for the project. On March 31, 1992 the County filed a complaint in condemnation to acquire a fee simple interest in about 3420 sq. ft. of defendant's property. The area comprised a 27-foot-wide by 175-foot-long strip of defendant's Lots 11, 11-1, 11-2, in Block 673 bordering Brick Boulevard. Fifteen feet of the twenty-seven-foot strip were already subject to the permanent easement which the County had obtained from defendant in 1979.

On May 27, 1992 the County filed a declaration of taking for exclusive possession and title to the property pursuant to *N.J.S.A.* 20:3-17 to -20 and *N.J.S.A.* 27:16-1 to -76. Due to the fifteen-foot easement previously granted, as well as the lack of any known or permitted use for the strip, the County's appraisal report provided for no compensatory damages to defendant for the acquisition of that part of the property.

On August 20, 1993 defendant brought a motion before Judge Cooper seeking exclusion of the County appraisal, inclusion of its own appraisal, and a declaration of its right to damages for the loss of its property. The County cross-moved to restrict the defendant's

appraisal report and for an adjudication that the County was the legal owner of the easement previously granted by defendant.

After hearing argument on August 29, Judge Cooper entered her order on *September 1* denying defendant's motion to exclude the County's appraisal. She granted plaintiff's cross-motion, "to the extent that the Court concludes that a Deed of Road Easement, attached hereto as exhibit 'A', is owned by the County of Ocean, lawfully, and the County of Ocean does not have to pay any compensation for the interest in real property reflected in Exhibit 'A' attached hereto."

Defendant sought leave to appeal, *R.* 2:2-3(b), which we granted on October 18, 1993. Defendant urges that requiring an applicant to grant to the County an easement for road widening as a condition precedent to approval of a site plan application was *ultra vires* and illegal absent a rational nexus, which did not exist here, between the need to widen the road and the applicant's proposed usage. To that extent, defendant is correct.

In *Harris v. Salem County Planning Bd.*, 123 *N.J. Super.* 304 (App. Div.), *certif. denied*, 64 *N.J.* 152 (1973), we held that *N.J.S.A.* 40:27-6.2, which permitted Boards of Chosen Freeholders to require site plan applicants to dedicate certain portions of their property which border county roads in order to conform to the County's master plan, was not necessarily a taking without just compensation, and was constitutional. *Id.* at 307. However, we disagreed with the proposition that in every case a board could require dedication of land for rights of way without compensating the land's owner. "We interpret the cases

hereinafter cited as authorizing a municipality to compel a subdivider to install off-site improvements and to pay so much of the cost thereof which bears a *rational nexus* to the needs created by and benefits conferred upon the subdivision." *Id.* at 307 (citations omitted) (emphasis added).

Two years later, *181 Inc. v. Salem County Planning Bd.*, 133 *N.J. Super.* 350 (Law Div. 1975) *aff'd in part, rev'd in part*, 140 *N.J. Super.* 247 (App. Div. 1976), involved these facts: plaintiff, the owner of a small tract in Woodstown, sought board approval to locate its law office on Elm Street. The site plan committee recommended approval of the application subject to the condition that plaintiff dedicate an eight-foot strip of land along its border with Elm Street for future road widening, the planning for which was indefinite. Plaintiff promptly filed an action in lieu of prerogative writ to strike the board's condition. Judge Miller recognized *Harris'* rational nexus test in holding that the blanket policy of the County to require dedication of frontage from applicants' property regardless of the existence of a true and reasonably imminent plan to widen the road was an unconstitutional taking without just compensation. *Id.* at 357.

> There should be, at the bare minimum, a proposal for the imminent use of the land, not a mere "banking" for unscheduled future use. While it is true that road appropriations are made on an annual basis[,] it is also true that plans for road work involve "lead time." If the county does not intend to use the land proposed to be taken within such "lead time," to take it

> without compensation merely because opportunity presents itself runs afoul of the Constitution.
>
> [*Ibid.*]

Judge Miller explained the basis of the rational nexus test used in *Harris*.

> [F]or the *nexus* test to apply thus making a compulsory dedication constitutionally valid, the *nexus* must be *rational*. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements – not for the purpose of "banking" the land for use in a projected but unscheduled possible future use.
>
> [*Id.* at 359.]

The judge then found that no rational nexus existed because the already light traffic flow on Elm Street would increase only negligibly with the proposed location of plaintiff's law office. Further, the record showed that the county required the dedication solely for the general future growth of the community and the county as a whole. Accordingly, he ruled, "[t]here is nothing wrong with the county taking this land pursuant to the statute, provided it pays a fair price therefore." *Id.* at 361.

In the case before us, the facts are substantially similar. Subject to its approval of defendant's 1979 site plan

application, the County required that a fifteen-foot strip of defendant's land abutting Brick Boulevard be dedicated, "for possible future street widening." This language fortifies the likelihood that the board was simply attempting to seize an opportunity to "bank" the land in case it should ever need it. The fact that more than ten years elapsed before the County decided to widen the road is further evidence. A decade was not reasonably within this project's "lead time" and the County certainly cannot claim that this dedication was for presently contemplated, immediate improvements because of burdens on the road created by defendant.

The County seems to suggest that this was an isolated incident and this defendant voluntarily donated the easement in order to ease its application through the system. However, even without the benefit of the Board's 1979 hearing transcript, we can conclude from the minutes of the Board's meeting contained in defendant's appendix, that the County regularly required such dedications regardless of any rational nexus between an applicant's plan and the burden to the abutting roadway. We are satisfied from the record that the County acted unconstitutionally if it required defendant to dedicate the 1979 easement as a condition of the approval. *N.J. Const. art.* I, ¶ 20. If defendant had brought a timely action in lieu of prerogative writ in 1979 to challenge the conditional dedication, it likely would have succeeded. *R.* 4:69-1. But defendant did not challenge the Board's actions. Fourteen years later, and only after this condemnation action was filed, defendant stepped forward and asserted its alleged rights. Hence, the issue of timeliness in challenging governmental action must be considered.

Defendant relies primarily on *Mill Race, Ltd. v. Mayor & Twp. Comm. of Bernards Twp.*, 230 *N.J. Super.* 160 (App. Div. 1989), *certif. denied*, 117 *N.J.* 154 (1989). Defendant stresses that *Mill Race* held that an action to recover off-site improvement fees which had been paid pursuant to a local ordinance, later declared *ultra vires*, was not barred when brought after the 45-day time-period had expired. *Mill Race* held that the cause of action did not accrue until the municipality actually had refused, when requested, to return the owner-developer-plaintiff's money. *Id.* at 167-68.

The plaintiff in *Mill Race* was the owner of property in Bernards Township. *Id.* at 163. In 1982, plaintiff sold the land to Country Place Associates which intended to develop it. *Ibid.* Their agreement provided for an offset in the contract price of the amounts Country Place was required to pay for sewer connections, assessments and the disputed off-site improvements mandated by local ordinance. Country Place immediately paid all the fees and commenced development. *Ibid.*

Three years later, on February 25, 1985, in *New Jersey Builders Ass'n v. Mayor and Twp. Comm. of Bernards Twp.*, 211 *N.J. Super.* 290 (Law Div. 1985), *aff'd*, 219 *N.J. Super.* 539 (App. Div. 1986), *aff'd*, 108 *N.J.* 223 (1987) Judge D'Annunzio held that the ordinance of Bernards Township requiring developers to pay for off-site improvements was *ultra vires*. Two weeks after Judge D'Annunzio's decision in the Law Division, the *Mill Race* plaintiff, as the assignee of Country Place, requested that the Township return the disputed fees. *Mill Race, supra*, 230 *N.J. Super.* at 163. When the Township refused, the

*Mill Race* plaintiff immediately filed suit to recover those sums. *Ibid.*

We reverse the Law Division judge's ruling in *Mill Race* that plaintiff's time to appeal the 1982 fee payments had expired by 1985.

> [P]laintiff's assignor's claim was successive to that of the Builders Association in overturning the ordinance. The right to claim a refund therefore did not accrue until the municipality failed to return the payments made under the voided ordinance. The complaint here was filed within days of Judge D'Annunzio's decision and years prior to the time the decision became final after appellate review.
>
> [*Mill Race, supra,* 230 *N.J. Super.* at 168.]

Although the payments were made three years earlier, they had never before been ruled illegal; therefore, plaintiff's cause of action had never accrued. Because plaintiff in *Mill Race* immediately asserted its newly-acquired rights, its action was held timely.

Conversely, in this case the County's conduct, allegedly extorting the right-of-way easement, had been declared unconstitutional in 1975 in *181 Inc., supra,* four years before defendant here was allegedly wronged. " 'Generally, a cause of action accrues when facts exist which entitle one party to maintain an action against another.' " *Trenkamp v. Twp. of Burlington,* 170 *N.J. Super.* 251, 263 (Law Div. 1979), *quoting, Kohler v. Barnes,* 123 *N.J. Super.* 69, 79 (Law Div. 1973). Thus, defendant's cause of action in the case before us seemingly arose at the very moment it transferred the deed of easement to the County in 1979. *Mill Race* is inapposite. Had the "takings"

cases discussed above been decided only recently, then perhaps *Mill Race* might assist defendant. However, as the circumstances appear to us, defendant was subject in 1979 to the time limits prescribed by our rules for challenging any planning board decisions.

*R.* 4:69-6 provides in pertinent part that,

> No action in lieu of prerogative writ shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.
>
> (b) . . . . No action in lieu of prerogative writs shall be commenced . . .
>
> . . . .
>
> (3) to review a determination of a planning board . . . after 45 days from the publication of a notice once in the official newspaper of the municipality. . . .

The defendant's right to challenge the Board's condition accrued at the moment it conveyed the deed of easement to the County, February 22, 1979. The time for a challenge expired long ago.

*R.* 4:69-6(c) does provide for the relaxation of paragraphs (a) and (b), and enlargement of the time in which to appeal a planning board's determinations, "where it is manifest that the interest of justice so requires." In Judge Pressler's comments she explains that section (c) was inserted,

> "to restate in the form of a generalized standard, decisional exceptions which had already been engrafted upon the rule", *Schack v. Trimble*, 28

> *N.J.* 40, 48 (1958). These exceptions include (1) substantial and novel constitutional questions . . . (3) an important public rather than a private interest which requires adjudication or clarification. See, e.g., *Reilly v. Brice*, 109 *N.J.* 555 (1988); *Schack v. Trimble, supra*. . . .
>
> [Pressler, *Current N.J. Court Rules*, comment 7 on *R.* 4:69-6(c) (1994) (some citations omitted).]

We conclude that these exceptions are inapplicable here. After fourteen years, there is no novel or substantial constitutional question which commends resolution; nor does any important public interest require clarification or vindication.

We conclude that defendant's lack of diligence during the fourteen-year lapse of time before attacking the Planning Board's requirement of the "donative" conveyance of the fifteen-foot-wide road easement is fatal to its claim for compensation in this condemnation proceeding. As the County points out, the defendant could have granted the easement under protest and promptly started an action in lieu of prerogative writ to challenge the alleged "donation . . . for possible future street widening." The defendant did not do so but proceeded to use the roadside parking spaces without approval until condemnation loomed. Moreover, this case is not remotely similar to a situation where an innocent purchaser promptly seeks relief from a local board to excise an illegal condition on an old grant of variance, as permitted by *Aldrich v. Schwartz*, 258 *N.J. Super.* 300, 311-12 (App. Div. 1992) (twenty-year old condition could be attacked by bona-fide, new purchaser). The present situation is in no sense equitably comparable to *Aldrich*. Defendant's

attack on the 1979 grant of easement is time-barred and its claim for compensation is precluded.

Affirmed.

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**
**DOCKET NO. AM-71-93-T2**
**MOTION NO. M-446-93**
**BEFORE PART: B**
**JUDGE(S): KING**
**HAVEY**
**RODRIGUEZ**

COUNTY OF OCEAN, A public Corp of the State of New Jersey
vs
ZEKARIA REALTY, INC A NJ Corp; FIRST FIDELITY BANK, N.A. NJ9 [sic] formerly known as The First National Bank of Toms River, NJ) JOSEPH PERROTTE, and CRAIG SKAWINSKI

MOTION FILED:
SEPTEMBER 10, 1993

ANSWER(S) FILED:
SEPTEMBER 27, 1993 BY: COUNTY OF OCEAN

BY:

BY:

BY:

BY:

SUBMITTED TO COURT:
OCTOBER 13, 1993

## ORDER

(Filed Oct. 21, 1993)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 18th DAY OF OCTOBER, 1993, HEREBY ORDERED AS FOLLOWS:

MOTION BY ~~APPELLANT/RESPONDENT~~ ZEKARIA REALTY, INC FOR LEAVE TO APPEAL AND FOR SUMMARY REVERSAL

| GRANTED | DENIED | OTHER |
|---|---|---|
| X | | X |

SUPPLEMENTAL:

The motion for leave to appeal is granted. The motion briefs are accepted as merits briefs and the appeal is deemed perfected and ready for calendaring.

FOR THE COURT:

/s/ Michael Patrick King
MICHAEL PATRICK KING P.J.A.D.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ Emille R. Cox
Clerk

SUPREME COURT OF NEW JERSEY
M-1326 September Term 1993
38,356

COUNTY OF OCEAN, etc.,

Plaintiff-Respondent,

v.

ZEKARIA REALTY, INC., etc.,

Defendant-Movant.

ORDER

(Filed
Jun. 22, 1994)

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of June, 1994.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

BERRY, KAGAN & SAHRADNIK
A Professional Corporation
212 Hooper Avenue
P.O. Box 757
Toms River, New Jersey 08754
(908) 349-4800
Attorneys for Plaintiff

| | |
|---|---|
| COUNTY OF OCEAN, a Public Corporation of the State of New Jersey,<br><br>Plaintiff,<br><br>vs.<br><br>ZEKARIA REALTY, INC. etal. [sic],<br><br>Defendants | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION-OCEAN COUNTY<br>DOCKET NO. L-1496-92<br><br>CIVIL ACTION<br><br>ORDER<br><br>(Filed Sept. 1, 1993) |

This matter coming on to be heard on the application of Defendant, Zekaria Realty, Inc. to exclude Plaintiff's Appraisal and Plaintiff, County of Ocean, having filed a Cross-Motion to limit the Defendant's Appraisal Report, and the Court having heard oral argument of counsel, Seymour J. Kagan, Esq. for the plaintiff, and Peter H. Wegener, Esq., for the defendant, property owner, and the Court having rendered an opinion and decision in open court on August 20, 1993, and good cause having been shown,

IT IS on this 1st day of Sept. 1993

ORDERED:

1. Defendant, Zakaria [sic] Realty, Inc.'s Motion to exclude Plaintiff's Real Estate Appraisal, is denied.

2. Plaintiff's Cross-Motion to limit Defendant's Appraisal Report is granted to the extent that the Court concludes that a Deed of Road Easement, attached hereto as Exhibit "A", is owned by the County of Ocean, lawfully, and the County of Ocean does not have to pay any compensation for the interest in real property reflected in Exhibit "A" attached hereto.

3. The Plaintiff has alleged that certain parking spaces owned by the defendant, property owner, outside of the Road Easement described in Exhibit "A", are illegal and contrary to the Site Plan Approval secured by the defendant, property owner, in 1979. The Court shall permit the Plaintiff to make application by Motion in Limine to exclude as a damage consideration those parking spaces taken by the County of Ocean, which parking spaces are allegedly inconsistent with the 1979 Site Plan Approval obtained by the defendant, property owner.

/s/ Rosalie B. Cooper, J.S.C.
ROSALIE B. COOPER, J.S.C.

BATHGATE, WEGENER, DUGAN & WOLF, P.C.
One Airport Road
P.O. Box 679
Lakewood, New Jersey 08701
(908) 363-0666
Attorneys for Defendant/Appellant, Zekaria Realty, Inc.

| | |
|---|---|
| COUNTY OF OCEAN, a Public Corporation of the State of New Jersey,<br><br>Plaintiff/ Respondent,<br><br>vs.<br><br>ZEKARIA REALTY, INC., et al<br><br>Defendant/ Appellant. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>OCEAN COUNTY<br>DOCKET NO. OCN-L-1496-92<br><br>CIVIL ACTION<br><br>ORDER GRANTING STAY PENDING DISPOSITION OF THE APPEAL<br><br>SAT BELOW:<br><br>HONORABLE ROSALIE B. COOPER, J.S.C.<br><br>(Filed Sep. 24, 1993) |

THIS MATTER being opened to the Court by Bathgate, Wegener, Dugan & Wolf, P.C., attorneys for Defendant-Appellant, Zekaria Realty, Inc. (Michael I. Halfacre, Esq., appearing), in the presence of Seymour J. Kagan, Esq., attorney for Plaintiff-Respondent, County of Ocean, on Motion for a Stay Pending Disposition of the Appeal pursuant to *R.*2:9-5, and the Court having considered all

papers submitted in support of and in opposition to the motion and oral argument having been heard, and for further good cause shown,

IT IS on this 24 day of September, 1993;

ORDERED that Defendant/Appellant's Motion for a Stay pending disposition of the appeal is hereby granted; and it is further

ORDERED that this matter shall be stayed from any further action by the Plaintiff/Respondent and the matter shall not be placed on the calendar of the Superior Court of New Jersey, Law Division, Ocean County pending disposition of the appeal; and it is further

ORDERED that a copy of this Order shall be served upon all counsel of record within 7 days of the date hereof.

/s/ Rosalie B. Cooper, J.S.C.
ROSALIE B. COOPER, J.S.C.

OCEAN COUNTY PLANNING BOARD
119 Hooper Avenue
Toms River, New Jersey

Regular meeting Wednesday, November 1, 1978, 8:00 P. M., Room 119, Administration Building, Hooper Avenue, Toms River, New Jersey.

Chairman H. George Buckwald presiding: Attending: Freeholder Hoffman, Messrs, Lane, Oakley, Manuwald, Carlson, Hennes, Bertrand.

Chairman H. George Buckwald read the statement that proper and legal notice of the Planning Board meeting had been posted.

On a motion by Mr. Oakley, seconded by Mr. Lane the minutes of the meeting of October 18, 1978 were approved. The motion was unanimously carried.

On a motion by Mr. Bertrand, seconded by Mr. Carlson the following bills were approved. The motion was unanimously carried. Callaghan & Co. $30.00, Carrolls Caravelle Inn $1,828.79 – $1,858.79 Total

## SUBDIVISION AND SITE PLAN REVIEW

### BERKELEY TOWNSHIP

Lots 19C, 28, Bk. 4 Holiday at Berkeley, Sect. W

On a motion by Mr. Oakley, seconded by Mr. Carlson this subdivision was given final approval. The motion was unanimously carried.

Lot 1, Bk. 1612

On a motion by Freeholder Hoffman, seconded by Mr. Manuwald this subdivision was given final approval. The motion was unanimously carried.

Lot 1, Bk. 1611 (Prel.)

On a motion by Mr. Bertrand, seconded by Mr. Carlson this subdivision was given preliminary approval, final approval contingent upon the dedication on Harbor Road being shown as dedicated to the Township. The motion was unanimously carried.

Lot 2, Bk. 1613 (Prel. & Final)

On a motion by Mr. Manuwald, seconded by Mr. Carlson this subdivision was given preliminary and final approvals. The motion was unanimously carried.

BRICK TOWNSHIP

Lot 5, Bk. 672 (SP)

This site plan was withdrawn by Shepherd Engineering.

Lot 4, Bk. 378

On a motion by Mr. Manuwald, seconded by Mr. Carlson this subdivision was given final approval. The motion was unanimously carried.

Lot 4, Bk. 378 (SP)

On a motion by Mr. Lane, seconded by Mr. Carlson this site plan was given final approval.

Lot 11-1, 11-2, Bk. 673 (SP)

On a motion by Mr. Carlson, seconded by Mr. Manuwald this site plan was given final approval contingent upon the following: This site plan lies along Brick Blvd. which is a County Road and we require the developer to dedicate 40' from center line, also we require that the developer (1) install curb 23' from center line and (2) provide for two driveways – one at the North and (exit only) and one at the South end (entrance only), and the filing of a road easement form for the additional dedication and the proposed curb being shown on the plan. The motion was unanimously carried.

DOVER TOWNSHIP

Lot 2, Bk. 573

On a motion by Mr. Oakley, seconded by Mr. Carlson this subdivision was given final approval. The drainage assessment in the amount of $305.00 was paid. The motion was unanimously carried.

Lots 16, 17, Bk. 1031-A-7

On a motion by Mr. Manuwald, seconded by Mr. Bertrand this subdivision was given final approval. The motion was unanimously carried.

Lots 71, 72, 73, Bk. 789-2

On a motion by Mr. Manuwald, seconded by Mr. Carlson this subdivision was given final approval. The motion was unanimously carried.

Silver Ridge Apts. West

On a motion by Mr. Carlson, seconded by Mr. Oakley this subdivision was given final approval, however we suggest that before Dover Township Planning Board grants their approval they should make sure the applicant has received approval from Berkeley Township regarding the drainage outfall line. The motion was unanimously carried.

Lots 9, 10, Bk. 10, Lot 1, Bk. 13 Twin Oaks, Sect. 3B (Prel. & Final)

On a motion by Mr. Carlson, seconded by Mr. Manuwald this subdivision was given preliminary and final approvals. The motion was unanimously carried.

Lots 2-5, Bk. 13 Twin Oaks, Sect. 3B (Prel. & Final)

On a motion by Mr. Manuwald, seconded by Mr. Carlson this subdivision was given preliminary and final approvals. The motion was unanimously carried.

Lot 15, Bk. 688

On a motion by Mr. Carlson, seconded by Mr. Manuwald this subdivision was given final approval. The motion was unanimously carried.

Presbyterian Church (SP)

On a motion by Mr. Manuwald, seconded by Mr. Oakley this site plan was given final approval. The motion was unanimously carried with Mr. Lane abstaining.

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OCEAN COUNTY PLANNING BOARD
119 Hooper Avenue
Toms River, New Jersey

Regular meeting Wednesday, December 6, 1978, 8:00 P. M., Room 119, Administration Building, Hooper Avenue, Toms River, New Jersey.

Chairman H. George Buckwald presiding: Attending: Messrs, Lane, Oakley, Manuwald, Gillette, Hennes, Pollock.

Chairman H. George Buckwald read the statement that proper and legal notice of the Planning Board meeting had been posted.

On a motion by Mr. Oakley, seconded by Mr. Lane the minutes of the meeting of November 1, 1978 were approved. The motion was unanimously carried.

On a motion by Mr. Lane, seconded by Mr. Manuwald the following bills were approved. The motion was unanimously carried.

N.J. State League of Municipalities-
Conf. Registration ..... $ 15.00
Community News Service-
Subscription ..... $ 10.20

| | |
|---|---|
| Sheraton Seaside Hotel- | |
| Rooms, League of Mun. Convention | $378.00 |
| Carroll's Caravelle Inn- | |
| Coastal Counties Comm. Meeting | $ 19.42 |
| Historic Towne of Smithville- | |
| League of Mun. PB Dinner | $381.94 |
| N.J. Fed. of Planning Officials- | |
| Membership 1979 | $ 70.00 |
| TOTAL OPERATING EXPENSES | $874.56 |

## SUBDIVISION AND SITE PLAN REVIEW

### BARNEGAT LIGHT BORO

Lots 1, 2, 3, Bk. 17

On a motion by Mr. Manuwald, seconded by Mr. Lane this subdivision was given final approval. The motion was unanimously carried.

### BEACHWOOD BORO

Lots 14-22, Bk. D-3

On a motion by Mr. Gillette, seconded by Mr. Oakley this subdivision was given final approval. The motion was unanimously carried.

### BEACH HAVEN BORO

Lot 1, 1A, Bk. 18 (SP)

On a motion by Mr. Manuwald, seconded by Mr. Lane this site plan was given final approval. The motion was unanimously carried.

Lots 1, 2, Bk. 116

On a motion by Mr. Oakley, seconded by Mr. Gillette this subdivision was given final approval. The motion was unanimously carried.

BRICK TOWNSHIP

Lot 3, Bk. 867 (SP)

On a motion by Mr. Gillette, seconded by Mr. Manuwald this site plan was given final approval.

Lots 8-18, Bk. 1033, 1067A (Prel.)

On a motion by Mr. Gillette, seconded by Mr. Manuwald this subdivision was given preliminary approval. It is to be noted that the existing turning movements on Burnt Tavern Road will not be altered. Right turn in and Right turn out, only. The motion was unanimously carried.

Lots 11, 11-1, 11-2, Bk. 673 (SP)

On a motion by Mr. Gillette, seconded by Mr. Lane this site plan was given final approval subject to the filing of the road easement form for the additional dedication as this was one of the contingencies listed 11/1/78. The motion was unanimously carried.

DOVER TOWNSHIP

Lot 1, Bk. 392B

On a motion by Mr. Manuwald, seconded by Mr. Lane this subdivision was given final approval subject to the following: This minor subdivision was last submitted 12/21/77 and at that time a $600.00 drainage assessment was levied, to date it has not been paid also the sight triangle easement should be dedicated to Ocean County and further development of Lot 1-2 will require more complete drainage study. The motion was unanimously carried.

Lots 108, 110, 114, 116, 118, 122, Bk. 722-3

On a motion by Mr. Oakley, seconded by Mr. Lane this subdivision was given final approval. The motion was unanimously carried.

Lot 153, Bk. 444

On a motion by Mr. Oakley, seconded by Mr. Lane this subdivision was given final approval subject to the following: (1) the R.O.W. on Fischer Blvd. being shown on the plan and the addition of a key map. The motion was unanimously carried.

Lot 7, Bk. 724B

On a motion by Mr. Gillette, seconded by Mr. Lane this subdivision was given final approval subject to a key map being put on the plat. The motion was unanimously carried.

Lots 40-43, Bk. 669

On a motion by Mr. Gillette, seconded by Mr. Lane this subdivision was given final approval subject to a dedication 30' from center line along East Water Street. The motion was unanimously carried.

Lot 13, Bk. 682-17 (SP)

On a motion by Mr. Gillette, seconded by Mr. Lane this site plan was given final approval. This site plan lies along Water Street which is a county road and a 30' dedication from center line is required, however due to the existing setback conditions, the Board waived the additional dedication. The motion was unanimously carried.

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# PLANNING BOARD TOWNSHIP OF BRICK
# RESOLUTION FOR FINAL APPROVAL
# SITE PLAN WITH VARIANCE REQUEST

RESOLUTION R-9-79 February 14, 1979

Case #1108 – Zekaria Realty

WHEREAS, application has been made by Zekaria Realty of Brick Town, New Jersey, for final approval of site plan of Lots 11, 11-1, 11-2 in Block 673 as shown on the Tax Map of the Township of Brick, with additional request for variances for minimum lot area, minimum front yard set-back, minimum side yard set back on both sides in accordance with a map prepared by Triangle Engineering Associates, Inc., dated November 13, 1978 with latest revision date January 29, 1979; and

WHEREAS, the applicant further seeks variance as set forth above for existing deficiencies; and

WHEREAS, the Board after carefully considering the evidence presented by the applicant at the hearing on January 24, 1979 and no one appearing as adjoining property owners and the general public, and having reviewed the exhibits produced, the Planning Board has made the following factual findings:

SEE FACTUAL FINDINGS ATTACHED. (Page Five)

WHEREAS, the Planning Board has determined that failure to grant the requested relief would result in exceptional and undue hardship to applicant's property and that the relief requested by the applicant can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of

the Zone Plan and Zoning Ordinance of the Township of Brick, for the following reasons:

SEE REASONS ATTACHED. (Page Seven)

WHEREAS, the Planning Board is of the opinion based upon the above factual findings that the site plan as such as would encourage development and design consistent with the Master Plan of the Township of Brick and should be approved.

NOW, THEREFORE, BE IT RESOLVED, by the Planning Board of the Township of Brick, that the application of Zekaria Realty be on this 14th day of February, 1979, granted subject, however, to the following conditions:

1. That the applicant provide details of a commercial driveway that would be satisfactory to the Engineer for the Planning Board.

2. That the applicant change the present alignment of the sidewalks so that the back of the sidewalk is one foot off the property line. The sidewalk shall be five (5) foot in width with four (4) foot thereafter to the curb face. Said design of the new sidewalk location shall be in accordance with the suggestion by the Brick Township Planning Board Engineer.

3. That the applicant alter the building so as to maintain only a one story structure. There shall be no second floor constructed therein. Additionally there shall be no basement floor space utilized for retail sales.

4. That Ocean County Planning Board approval be shown on the plan.

5. That the applicant shall show the total square footage of the building on the plan.

6. That the applicant show the size of all parking stalls on the plan to be 10' x 20'.

7. That the applicant show the correct curbs and sidewalks on the plan.

8. That any change or deviation in the approved site plan will require the applicant to come back before the Brick Township Planning Board for approval of said change or deviation.

9. That the applicant remove the first parking space on the northerly boundary and the fourth and fifth spaces. The applicant will add two additional spaces along the back row of parking so as not to be insufficient in parking.

10. The applicant will up-grade the existing planting to meet the suggestions of the Shade Tree Commission.

11. The applicant shall post an inspection fund with the Township Clerk in an amount to be determined by the Township Engineer.

12. That before the issuance of a building permit, the applicant shall furnish the Township with a performance bond, in an amount to be determined by the Township Engineer.

NOW, BE IT FURTHER RESOLVED, that the variance request for minimum lot area, front yard set-back and for two (2) side yard set-back violations be and the same are hereby granted approval for the reasons set forth above and subject to the conditions set forth herein.

Moved: Mrs. Butler
Seconded by: Mayor Kinnevy
Voting in the Affirmative: Mrs. Butler Mayor Kinnevy
Mrs. Dello Russo
Mr. Eberle

Voting in the Negative:

Ineligible to vote: Councilman Kull

Abstaining:

Absent: Mrs. Cook Mr. Post
Mr. Greenberg
Mr. Kadar

CERTIFICATION

I, E. Joan Kull, Clerk to the Planning Board of the Township of Brick, County of Ocean, do hereby certify that the foregoing resolution was duly passed by the said Planning Board of the Township of Brick at a regular meeting held on the 14th day of February, 1979.

IN WITNESS THEREOF, I have set my hand this 16th day of February, 1979.

/s/ E. Joan Kull
E. Joan Kull, Clerk
Planning Board of the Township
of Brick

## FACTUAL FINDINGS

Case #1108 – Zekaria Realty

Block 673, Lots 11, 11-1 & 11-2

1. The applicant seeks to renovate and add additional cube space to an existing building on the property. The application is increasing the cube space but will not be adding any additional floor space.

2. The applicant's architect testified that the renovated stores will continue to be a slab on grade. There will be no basement under the renovated section.

3. The applicant indicated that there will be no additional floor space or selling space created and that the stores will continue to be one story.

4. The applicant has donated fifteen (15') feet to the County of Ocean for possible future street widening.

5. The applicant has agreed to eliminate the first parking space in the northerly boundary and the fourth and fifth spaces. The applicant shall thereafter add two additional parking spaces on the back row of parking so as to meet the minimum requires of the ordinance.

6. The applicant has indicated that he will amend his plans to show the total square footage of the building and the sizes of the parking stalls.

7. The applicant has indicated that he will up-grade his existing planting to meet the suggestions of the Shade Tree Commission.

8. The applicant will not be enlarging the size of the existing structure except that the roof will be raised for additional cube space.

## REASONS FOR GRANTING VARIANCE

Case # 1108 – Zekaria Realty

Block 673, Lots 11, 11-1 & 11-2

1. Testimony indicates that the requested variance for lot area, front yard set-back and two side yard set-backs are all existing conditions on the site because of the shape of the land and existing building. The applicant testified that there will not be any increasing of the non-conformity in any way.

P-4 4/21/93

Prune Exist. Juniper
Plant 2 Dwarf Elongmus 2 1/2'to 3'
1 Flowering Cherry 8'
20 Juniper Sargents 15"to18"
Exist. Shrubs
Wood Chip. Mulch

S 79°-30'E 401.90' (386.65' New R.O.W. Line)

EXIT ONLY
53.68
53.96
Depress Curb 27'
Conc. Curb
Rel. Wall
52.6
53.17
100.8
48.44
47.9
PAV'T.
MACADAM
CONC. RAMP
31'
44.92
48.91
48.89
48.64
48.32
48.05
ZONE FIRE PARKING NO
LANE FIRE PARKING NO
NO PARKING
54.26
67.7'
53.89
54.29
Sidewalk
Sign
Exist. Shrub
92.8'
92.6'
50.98
49.03'
4.7'
50.51
49.87
49.46
49.12
48.72
50.73
51.37
50.08
49.58
50.15
50.46
54.04
49.9
49.95
54.54
Prop. 5' Sidewalk
(Prop Curb)
54.03
24.75'
54.49
53.89
54.40
54.33
54.58
54.75
54.3'
54.5'
51.78
83.7'
75.1'
20.5'
16'
9.2'
14.3'
9.7'
75' Setback Line
1 STORY MASONRY BUILDING
FF 55.39
F.F. 54.62
ENTRANCE SIGN
EXIT SIGN
No EXIT SIGN
PAVEMENT
MACADAM DRIVEWAY
Curb Line
BRICK (49.5')
N 10°-58'E 173.68'
dedicated to County

S 79°-30'W 422.62'
407.37' New R.O.W. Line

LOT 10-1
LOT 10

**Exhibit "A"**

**ROAD EASEMENT**

**Know All Men By These Presents** that the undersigned, Zekaria Realty, a New Jersey Corporation 729 Brick Boulevard, Brick Township hereinafter called "grantor", in consideration of One Dollar -------- ($1.00) -------

do hereby grant and dedicate unto the County of Ocean, Township of Brick

it successors and assigns, a perpetual easement across the grantor's lands for a public road, said easement being in the Township of Brick
Ocean County, New Jersey, and is described as follows:

> BEING KNOWN as a portion of Lots 11, 11-1, 11-2, Block 673 as shown on the Tax Map of the Township of Brick.
>
> BEING described as a 15.25' wide road easement running parallel to and adjacent to Brick Boulevard. Said easement being 15.25' wide for a distance of 173.68' along Brick Boulevard. Beginning at a point in the easterly line of Brick Blvd. (a 49.5 foot R.O.W.), said point also being the southwest corner of Lots 11, 11-1, 11-2, Block 673 shown on Brick Town tax map; thence (1) North 10 deg. 58 min. East 173.68 feet along the easterly line of Brick Blvd. to the northwest corner of this tract; thence (2) South 79 deg. 30 min. East 15.25 feet along the northerly line of this tract to a point; thence (3) South 10 deg. 58 min. west 173.68 feet to a point; thence (4) North 79 deg. 30 min. west 15.25 feet to the point and place of beginning.

No consideration granted.

Annexed hereto is a sketch of survey of said easement

The grantor's lands were acquired by virtue of a Deed from Frederick & Doris Rom, dated August 28, 1975, recorded in Book 3472, Page 226 in the Ocean County Hall of Records.

**IN WITNESS WHEREOF,** the said grantor have hereunto set their hands and seals, or caused these presents to be signed by their proper corporate officer and caused their proper corporate seal to be hereto affixed this 22nd day of January, 1979

ZEKARIA REALTY

By: /s/ Stephen S. Zekaria
STEPHEN S. ZEKARIA, Pres.

Witnessed by:
/s/ Nancy E. Hall
NANCY E. HALL AsstSec.
Acknowledgment for individual

State of New Jersey )
) ss.:
County of )

Be it Remembered, that on this ___ day of ___ 19___, before me, the subscriber,

personally appeared

who, I am satisfied, ___ the person ___ named in and who executed the within Instrument,

and thereupon ___ acknowledged that ___ signed, sealed and delivered the same as ___ act and deed, for the uses and purposes therein expressed, and that the full and actual consideration paid or to be paid for the transfer of title to realty evidenced by the within deed, as such consideration is defined in P. L. 1968, Sec. 1(c), is $___

Prepared by: Harvey L. York, Esq.
202 Main Street, CN 2032
Toms River, New Jersey 08753

**Acknowledgment for Corporation**

State of New Jersey )
) ss.:
County of Ocean )

**Be it Remembered,** that on this 22nd day of January 1979 before me, the subscriber,

personally appeared Nancy E. Hall

who, being by me duly sworn on his oath, deposes and makes proof to my satisfaction, that he is the ASST. Secretary of Zekaria Realty

the Corporation named in the within Instrument;

that Stephen S. Zekaria is the President of said Corporation; that the execution, as well as the making of this instrument, has been duly authorized by a proper resolution of the Board of Directors of the said Corporation; that deponent well knows the corporate seal of said Corporation; and that the seal affixed to said Instrument is the proper corporate seal and delivered by said _____ president as and for the voluntary act and

deed of said Corporation, in presence of deponent, who thereupon subscribed her name thereto as attesting witness, and that the full and actual consideration paid or to be paid for the transfer of title to realty evidenced by the within deed, as such consideration is defined in P.L. 1968, Sec. 1(C), is $1.00

Sworn to and subscribed before me, )
) ss.:
the date aforesaid. )

[seal]

/s/ Betty A. Jump
BETTY A. JUMP

Notary Public of New Jersey
My Commission Expires
Feb. 18, 1980

/s/ Nancy E. Hall
NANCY E. HALL
Asst. Sec.

**Proof by Subscribing Witness**

State of New Jersey )
) ss:
County of )

**Be it Remembered,** that on this ___ day of ___ 19___, before me the subscriber

personally appeared _____ who, I am satisfied, is the person who signed the within instrument as
of

the corporation named therein and he thereupon acknowledged that the said instrument made by the corporation and sealed with its corporate seal, was signed,

sealed with the corporate seal and delivered by him as such officer and is the voluntary act and deed of the corporation, made by virtue of authority from its Board of ___, and that the full and actual consideration paid or to be paid for the transfer of title to realty evidenced by the within deed, as such consideration is defined in P.L. 1968, c. 49, Sec. 1(c), is $

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**ROAD EASEMENT**

TO

COUNTY OF OCEAN

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**Dated,** **19**

(Filed Feb. 23, 1979)

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**Office of the County Counsel**
**Ocean County**
**Toms River, New Jersey**

**ATLANTIC COAST
REALTY Appraisal
Group**

REAL ESTATE APPRAISERS – CONSULTANTS

Parcel #:32
Owner: Zekaria Realty, Inc.
Project: Brick Boulevard Reconstruction
Tax Block 673, Lot 11, 11.2 and 11.2
Brick Township
Ocean County, New Jersey
As of: August 26, 1991
ACRAG File #: BRK 211.32

PREPARED FOR:

County of Ocean
c/o Seymour J. Kagan, Esq.
212 Hooper Avenue
P.O. Box 757
Toms River, New Jersey 08754

DATED: August 26, 1991

PREPARED BY: Anthony S. Graziano, MAI

* * *

## DESCRIPTION OF THE TAKING

The taking of the subject property represents a fee acquisition by the County of Ocean for a parcel of land presently a part of the subject which is generally 17 to 22 feet in width by a length of approximately 173 feet along the entire frontage of Brick Boulevard.

The area of taking totals 3,420 s.f. or approximately 0.079+/- acres.

Improvements located within the taking consist of:

3,400 s.f. of asphalt paving
212 l.f. of curbing
688 s.f. of concrete sidewalk
400 s.f. of landscaped area
850 s.f. of stone area
2 small entrance signs #1 electric display sign

Based on the County contracts, the major electric display signs will be relocated on-site by the construction contractors.

## DESCRIPTION OF THE REMAINDER

After the taking by the County the subject site will contain 68,372 s.f. or 1.57 acres.

The frontage along Brick Boulevard will not be reduced by the taking.

The structure's setback after the taking will be reduced to 45 feet vs. the pre-existing conditions of 65 feet.

After the taking on-site parking will be reduced to 61 spaces which is approximately 5 spaces deficient of the parking as required by local zoning.

## HIGHEST AND BEST USE – AFTER THE TAKING

In evaluating the highest and best use for the subject property after we have recognized that it is within the

scope of this report to estimate the just compensation for a taking of the subject property which includes the value of the taking and any damages that may inure to the remainder.

As part of the analysis of the highest and best use in an after condition I have particularly recognized that the taking impacts the availability of the convenient and desirable front parking, the reduction of compliance with the zoning standards as it relates to parking, and the circuitry for truck vehicular traffic on-site particularly as it relates to access to the rear loading ramps of the basement area.

I have additionally recognized that the site development has been completed subject to local and county planning approvals which recognized and required dedication of the land area, the subject of this taking. Factually this plan permitted and required development consistent with the condition of the property after the take.

This issue was discussed with county counsel who confirmed that the valuation after must consider the legal development of the property as provided in the 1979 planning board resolution and property owner's site plan.

Accordingly the value after will consider that the taking of land and improvements is compensable while the possible damages were a function of the planning board approval, not this taking.

The following is a brief summary outlining the parking, lot coverage and other critical measurements in a before and after condition:

Parking Analysis

Required Parking

| | | |
|---|---|---|
| Retail | 4,050 s.f. @ 1/200 = | 20.25 spaces |
| Furniture Store | 18,400 s.f. @ 1/400 = | 46 spaces |
| Total Required | | 66 spaces |

| Unit | Before | After | Site Plan |
|---|---|---|---|
| GLA | 22,450 | 22,4500[sic] | 22,450 s.f. |
| Front Parking | 20 | 11 | 11 |
| Rear Parking | 50 | 50 | 45 |
| Total Parking | 70 | 61 | 56 |
| Parking Ratio | 1/320 | 1/368 | 1/400 |
| Front Parking % | 28% | 18% | 19.6% |
| Lot Coverage | 18.46% | 19.38% | 19.38% |

In an after condition, the front overall parking ratio, front parking ratio and lot coverage will be more compatible to the site plan and would represent the highest and best use of the property after the taking.

APPRAISAL PROCESS – AFTER THE TAKING

As the compensable items are limited to measurable assets within the taking, the Cost Approach is deemed the most valid technique.

**N.J. Stat. Ann. § 2A:14-7 (West 1987)**

**2A:14-7. 20 years; real actions**

Every action at law for real estate shall be commenced within 20 years next after the right or title thereto, or cause of such action shall have accrued.

# NEW JERSEY COURT RULES

## FOREWORD

Article VI, Section II, paragraph 3 of the New Jersey Constitution of 1947 charges the Supreme Court with the responsibility for making rules governing the practice and procedure in and the administration of all of the courts in the State. In the exercise of this obligation comprehensive rules were promulgated effective September 15, 1948 coincidental with the effective date of the Judicial Article of the Constitution.

To aid it in the rule-making process, the Supreme Court has appointed committees to study and make recommendations, and has solicited the assistance of the bench and bar generally. It has also provided for an annual Judicial Conference, representative not only of the legal profession but also of the legislative and executive branches of the government and of the lay public, to consider suggested improvements in the practice, procedure and administration of the courts. From time to time amendments to the rules have been promulgated as the need appeared; in 1953 a general revision of the rules was adopted; and subsequent thereto additional changes in the rules have been made whenever it appeared that an improvement could be effected.

Eight years ago, on the recommendation of its committee on rules, the Supreme Court initiated a program for the critical and comprehensive review and reappraisal of all of the rules of court. To carry out this program ten committees appointed by the Supreme Court were assigned responsibility for various parts of the rules. Each committee, with the area of its assignment, undertook a thorough analysis of the existing rules and the

effectiveness of their operation, examined the rules and statutes governing the courts of other states and the federal courts, and solicited suggestions for improvement from the entire bench and bar of the State. Reports of these committees were published and debated at several Judicial Conferences. A coordinating committee combined the several reports into a proposed revision of the rules which was published in the fall of 1966. Ten thousand copies were distributed to every attorney and judge in the State with the specific request that, individually and through their bar associations, they give it careful study and submit their critical comments and suggestions for its improvement. The proposed revision was subsequently discussed at a Judicial Conference and was then redrafted by the coordinating committee.

This 1969 revision thus represents the end product of literally years of work by dozens of court and bar association committees and hundreds of individual lawyers, judges and law school professors. The Supreme Court is indebted to those who have devoted so much of their time and energy to this project, without whose expertise and effort it could have not been brought to fruition.

SUPREME COURT OF NEW JERSEY

JOSEPH WEINTRAUB
C.J.

## New Jersey Constitution, Article I, § 20

### 20. Private property for public use

20. Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

## RULE 4:69. ACTIONS IN LIEU OF PREROGATIVE WRITS

### 4:69-1. Actions in Superior Court, Law Division

Review, hearing and relief heretofore available by prerogative writs and not available under R. 2:2-3 or R. 8:2 shall be afforded by a civil action in the Law Division of the Superior Court. The complaint shall bear the designation "In Lieu of Prerogative Writs".

Note: Source – R.R. 4:88-2 (first sentence), 4:88-3 (second sentence). Amended June 20, 1979 to be effective July 1, 1979.

### 4:69-2. Motion for Summary Judgment

If the complaint demands the performance of a ministerial act or duty, the plaintiff may, at any time after the filing of the complaint, by motion supported by affidavit and with briefs, apply for summary judgment.

Note: Source – R.R. 4:88-4.

### 4:69-3. Motion to Law Division for Stay

Upon or after the filing of the complaint, the plaintiff may, by order to show cause or motion supported by affidavit, and with briefs, apply for ad interim relief by way of stay, restraint or otherwise as the interest of justice requires, which relief may be granted by the court with or without terms. When necessary, temporary relief

may be granted without notice in accordance with R. 4:52-1.

Note: Source – R.R. 4:88-5.

**4:69-4. Power to Review Facts [Deleted]**

Note: Source – R.R. 4:88-13. Deleted November 27, 1974 to be effective April 1, 1975.

**4:69-5. Exhaustion of Remedies**

Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.

Note: Source – R.R. 4:88-14.

**4:69-6. Limitation on Bringing Certain Actions**

(a) General Limitation. No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.

(b) Particular Actions. No action in lieu of prerogative writs shall be commenced

(1) to contest or question any election under N.J.S. 18A:24-12 or N.J.S. 18A:24-29, after 15 days from the date of such election; or

(2) to review an assessment or award made for any municipal improvement after 30 days from the date of the confirmation of such assessment or award; or

(3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality, provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later. The notice shall state the name of the applicant, the location of the property and in brief the nature of the application and the effect of the determination or resolution (e.g., "Variance-Store in residential zone denied"), and shall advise that the determination or resolution has been filed in the office of the board or the municipal clerk and is available for inspection; or

(4) to review an ordinance, authorizing the construction of a railroad siding or sidings, or an ordinance or resolution for a public improvement in any municipality, after 30 days from the date of the passage or adoption of such ordinance or resolution; or

(5) any action in relation to joint sewers or disposal plants after 30 days from the date of the taking of the proceeding sought to be reviewed, or after the lapse of 30 days from the entry of the order of the court confirming the assessment; or

(6) to review any decision of a board of chosen freeholders refusing or granting a permit to erect a building in the bed of any highway after 30 days from the filing of the decision in the office of the board; or

(7) in any action under N.J.S.A. 54:5-104.29 to 104.71, inclusive, as amended (In Rem Tax Foreclosure Act), unless an answer has been filed within the time limited, nor after the expiration of 2 months from the filing of an answer denying the validity of the tax lien for which the lands were sold and certificate issued, or denying the legality of the proceedings to sell the lands, or denying the legality of the sale; or

(8) to review a sale of land to enforce an assessment or tax, or sale where assessments and taxes have been included together, after 18 months from the date of the sale, but this limitation shall not apply to proceedings taken after the sale, by the purchaser or holder of the tax sale certificate, under a statute to procure a deed or perfect title; or

(9) in the absence of fraud, to contest or set aside the tax sale certificate, notice and affidavit or service recorded as a deed, after 2 years from the date of their record; or

(10) to review an ordinance for an improvement after the contract therefor shall have been awarded; or

(11) to review any resolution or ordinance authorizing the issuance of notes or bonds of any municipality or other political subdivision, after 20 days from the date of the first publication thereof following final passage.

(c) Enlargement. The court may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires.

Note: Source – R.R. 4:88-15(a) (b) (1) (2) (3) (4) (5) (6) (8) (9) (10) (11) (12) (c), Paragraph (b) (1) amended July 7, 1971 to be effective September 13, 1971; paragraph (b)(3) amended November 2, 1987 to be effective January 1, 1988.

**4:69-7. Interlocutory Appeals**

If a final decision or action of an agency or officer is reviewable by a trial division of the Superior Court pursuant to R. 4:69, an application may be made by an aggrieved party to such Court for leave to appeal an interlocutory order of such agency or officer in the manner prescribed by R. 3:24, insofar as applicable. Notice of the application shall be given by the party appealing to all other parties in interest.

Note: Amended November 27, 1974 to be effective April 1, 1975.